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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 738

Case No. 810: NKUBANA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry, Mr. Mayer Gabay;

Whereas, on 13 September 1994, Alphonse Nkubana, a former staff member of the United Nations Economic Commission for Africa (ECA), filed an application requesting the Tribunal *inter alia*:

"...

(b) [To rescind] the decisions taken by the Secretary-General which were communicated to me by his letter of 25 July 1994, namely:

- the decision to dismiss me summarily;

- the decision to apply the harshest provision of rule 110.3 (a) of the Staff Rules and, moreover, without giving me any notice whatsoever or any termination indemnity or repatriation grant.

...

(d) In view of the foregoing [to accord] me compensation calculated as follows:

- Two years of salary, that is to say:
  $5,526.03 x 12 months x 2 = $132,624.72

..."

Whereas the Respondent filed his answer on 21 April 1995;

Whereas the Applicant filed written observations on 24 May 1995;

Whereas the Applicant submitted additional observations, together with additional documents, on 16 October 1995;

Whereas the Respondent submitted comments on the Applicant's submission on 30 October 1995; whereon the Applicant submitted observations on 2 November 1995;

Whereas, on 10 November 1995, the Tribunal asked the Respondent to produce additional documents and the latter did so on 14 November 1995;

Whereas, on 17 November 1995, the Applicant submitted comments on the documents which the Respondent produced;

Whereas the Respondent submitted comments on 22 November 1995;

Whereas the facts in the case are as follows:

The Applicant, a national of Rwanda, entered the service of the Economic Commission for Africa on 10 November 1982 as an Economic Affairs Officer at the P-3 level at ECA Headquarters in Addis Ababa. His initial two-year, fixed-term appointment was extended for one year and subsequently, on 10 November 1985, for a further two-year period. With effect from 11 September 1987, the Applicant was assigned to the Multinational Programming and Operational Centre (MULPOC) in Gisenyi, Rwanda. His appointment was repeatedly extended on a temporary basis until 9 June 1990 and subsequently until 31 May 1992. It was then extended for various periods ranging from one to three months. He

was reassigned to ECA Headquarters in Addis Ababa on 8 August 1993. With effect from 16 August 1994, the Applicant was summarily dismissed for serious misconduct.

On 11 March 1992, the Chief of the Administration and Conference Services Division of ECA advised the Office of Human Resources Management of his concern that the Applicant had been improperly involved in the political affairs of Rwanda. The Applicant was suspected of having played a role in harassment tactics used by local authorities against another staff member of MULPOC, also a national of Rwanda but from a different ethnic background. He stated "ECA took note of all these communications with dismay. The last straw however was the reception of the attached handwritten 'Note au Préfet', purportedly written by [the Applicant]". He noted "this appears to be [the Applicant's] handwriting" and, attaching a sample of his handwriting, requested "(i) whether it can be ascertained that this indeed is the staff member's handwriting; (ii) the next course of action."

The "Note au Préfet", dated 18 December 1990, stated, *inter alia*, the following:

> "Further to our talk of yesterday, I should like to tell you about a few cases which you might like to check with, *inter alia*, your Security Council ...
>
> 1. ..., from Kihihira village. It seems that he was very close to ... from the hospital at Ruhengeri, who is currently in prison. He was imprisoned during the events but was subsequently released.
>
> 2. ..., Manager of BCR in Gisenyi. He is in touch with the Goma refugees.
>
> 3. ..., Shopkeeper from Gisenyi. He has been questioned and is also in touch with the priest of Gisenyi who is currently in prison.
>
> 4. ... of the Bralima at Gisenyi - same group as ... and ... Prior to 4/10/90 they were always together and would withdraw to the bungalow of the Regina Hotel in the evening and would even turn the lights out where they were sitting. For example, the night of 3/10/90. The manager of the Regina Hotel can tell you more about their repeated meetings prior to 4/10/90.

5. ..., expert at the Gisenyi MULPOC. He, too, is in close touch with the refugees in Goma.

6. ..., expert at the Economic Community of the Great Lakes Countries. Also in close touch with the refugees in Goma.

II. With regard to these last two, I had mentioned them also on 30/11/90 to ..., prefect of the prefecture, so that he could intervene at the level of the Ministry of Foreign Affairs in order to terminate their assignment. Follow up on this.

...

N.B. ...

2. In addition, I think that the Gisenyi Security Council should, if possible, give you a complete rundown on the cases of those released and held, together with supporting evidence."

In a reply dated 30 March 1992, the Office of Human Resources Management advised ECA that they were unable to ascertain whether the handwriting of the Note was the Applicant's and that "ECA would be in a better position to determine this". They further advised that they would send the case to the Administrative Review Unit "to decide whether [the] Organization needs to take further action". In a memorandum to the Officer in Charge, Personnel Section, dated 18 September 1992, the Applicant, in response to a query, denied having written the Note. On 6 October 1992, ECA was advised that in view of the Applicant's denial, and absence of incriminating evidence, "there is no basis on which disciplinary action could be brought", and that "the matter will be closed at this point, but can be re-opened should any new evidence be uncovered".

In a memorandum dated 17 June 1993, the Director of MULPOC, Gisenyi, reported to the Chief, Administration and Conference Services Division, ECA, that the Applicant had repeatedly and publicly threatened him and his family. He enumerated 10 statements that had been made by the Applicant, and requested that a commission of inquiry be constituted to investigate the conduct of the Applicant. A Panel of Inquiry was sent to Gisenyi in June 1993

to investigate the Director's complaint.

The Panel of Inquiry found evidence that the Applicant had made 9 of the 10 statements listed in the Director's memorandum of 17 June 1993, and its findings were communicated on 24 September 1993 to the Applicant, together with extracts from the Panel's report. The report stated, with regard to the "Note au Préfet", apparently signed by the Applicant, that "when questioned as to whether or not he had written the incriminating Note, [the Applicant] admitted to having done so". The Applicant commented on the Panel's findings on 4 October 1993. With regard to the Note, he stated "in the first place it was confidential and its sole purpose was to protect the interests of the United Nations system" and that as a national working in the United Nations, the Préfet had, confidentially, requested his advice.

In the meantime, on 8 July 1993, following the Applicant's admission that he was the author of the "Note au Préfet", ECA requested the Chief, Administrative Review Unit, Office of Human Resources Management, to reopen the case against the Applicant. On 2 November 1993, the Chief, Administration and Conference Services Division, advised the Applicant of the charges of misconduct against him, including involvement in political partisanship and civil strife in Rwanda, denouncing a staff member to Rwandan authorities for political motives, deliberately lying to the Organization about his authorship of the "Note au Préfet", flouting the authority of the Director, MULPOC, and threatening to "make life difficult" for him.

The Applicant replied to the charges against him on 16 November 1993. On 18 March 1994, the Director of Personnel submitted the Applicant's case to the ad hoc Joint Disciplinary Committee (JDC) enumerating the charges of misconduct against the Applicant and requesting advice "as to what disciplinary measures, if any, should be taken against him". The Committee adopted its report on 12 May 1994. Its findings read, *inter alia*, as follows:

"33. On the basis of the evidence as presented above the JDC concludes that:

(i) Mr. Nkubana has shown political partisanship inconsistent with his duties and obligations as an international public official and through his activities as an informer took actively part in the civil strife in Rwanda.

(ii) From the 'Note au Préfet' it becomes abundantly clear that Mr. Nkubana denounced one of his colleagues and several other people, and further endangered the situation these persons were in.

(iii) Mr. Nkubana did not respect instructions from UN security on at least one occasion, thus violating the Standards of Conduct by not abiding to instructions and gives further rise to indications of his involvement in national security matters.

...

34. Taken to the letter Mr. Nkubana did not lie to the organization when he denied being the author of a typewritten, non-certified and unsigned photocopy of the transcription of the 'Note au Préfet'. However, he showed that he was well aware of the contents of the original 'Note', authorship of which he later recognized, and still recognizes. His denial, in 1992, of being the author of the 'Note' is considered by JDC, a violation of article 104.4 (e) of the Staff Rules, which requires all staff to *supply information* concerning ... facts relevant to his or her suitability, ... integrity, conduct and service as a staff member (emphasis added)".

The Committee did not find sufficient evidence to confirm the other charges against the Applicant. Its advice was:

"**VII. ADVICE JDC**

48. On grounds of serious misconduct and violation of staff rules 1.1, 1.4, 1.7, 104.4 (e), the Standards of Conduct, and the Oath of Office, the ad hoc Joint Disciplinary Committee appointed to advise the Secretary-General on the disciplinary case against Mr. Alphonse NKUBANA unanimously recommends that in accordance with regulation 10.2 (article X) and rule 110.3 of the Staff Rules, Mr. Nkubana should be: **SUMMARILY DISMISSED**."

On 25 July 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the Committee's report to the Applicant and informed him, *inter alia*, as

follows:

"...

The Committee concluded that you were guilty of serious misconduct and unanimously recommended that you should be summarily dismissed in accordance with staff regulation 10.2 and staff rule 110.3.

The Secretary-General has given careful consideration to the report of the Committee, and has concluded that there was sufficient evidence to support the finding that you denounced one of your colleagues, and other persons, to Government authorities in the context of the civil strife in Rwanda, thereby endangering their lives.

The Secretary-General has further concluded that your denial of having authored the Note to the Prefect containing the above-mentioned denunciations constituted unsatisfactory conduct, since it was established that you had, indeed, been the author of the said Note.

The Secretary-General has noted the Committee's finding that you had breached a curfew contrary to UN security instructions at a time when, according to all persons interviewed by the Committee except yourself, only security cars were allowed to circulate, and that this not only constituted misconduct, but also tended to indicate your involvement in security matters in Rwanda.

The Secretary-General has concluded that the above actions constitute serious misconduct on your part, and has therefore decided to accept the unanimous recommendation made by the Joint Disciplinary Committee in your case, and to summarily dismiss you pursuant to staff regulation 10.2, paragraph 2, and staff rule 110.3 (a) (viii) with effect from the date you receive this letter. In accordance with staff rule 110.3 and Annexes III and IV of the Staff Regulations and Rules, you shall not be given pay in lieu of notice, nor shall you be given any termination indemnity or repatriation grant."

On 13 September 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The investigation by the ad hoc Joint Disciplinary Committee was not

complete.

2. The Respondent's decision to summarily dismiss the Applicant on the basis of the findings of the ad hoc Joint Disciplinary Committee violated his rights, since, according to the Applicant, his actions, as found by the ad hoc Joint Disciplinary Committee cannot be considered as serious misconduct and do not warrant the recommendation of summary dismissal.

Whereas the Respondent's principal contentions are:

1. Given the length of the application, the Respondent deems it essential to identify the issues in dispute before replying to the many different arguments contained therein. The Applicant was originally charged with serious misconduct on five different grounds. In its recommendation to the Secretary-General, the ad hoc Joint Disciplinary Committee found the Applicant guilty of all but two of those charges. The recommendations by the ad hoc Joint Disciplinary Committee were accepted by the Secretary-General without reservations.

2. The Respondent notes that the principle *tantum devolutum quantum appellatum* entails that an appeal cannot have a broader object than the decision it contests. As the decision to summarily dismiss the Applicant was based on some but not all of the charges originally brought against the Applicant, the scope of this application must be limited to matters related to those charges invoked by the Respondent as grounds for dismissing the Applicant. The Respondent consequently submits that matters related to the two charges in respect of which the ad hoc Joint Disciplinary Committee made no recommendation are irrelevant for the present case.

The Tribunal, having deliberated from 3 to 21 November 1995, now pronounces the following judgement:

I. The Applicant has received the harshest penalty provided for under the Staff Rules: summary dismissal without compensation (rule 110.3 of the Staff Rules and Annexes III and IV of the Staff Regulations and Staff Rules). This measure has been taken on the basis of and in conformity with the unanimous recommendation of the ad hoc Joint Disciplinary Committee which was called to rule on the charges against the Applicant, the main one being that he denounced one of his colleagues and several other people to Rwandan authorities, thereby placing them in the context of the civil strife in Rwanda, in an exceedingly dangerous situation.

II. In the context in which they took place, there are certain aspects about the facts in question that remain unclear. The Tribunal considers, however, that any attempt to investigate them further would come up against insurmountable difficulties given the fact that the witnesses have scattered and given the prevailing situation in Rwanda following the tragic events which have bathed that country in blood. Assuming that such an investigation were to be undertaken, there is no guarantee that it would lead to better founded and objectively sounder conclusions than those which the ad hoc Joint Disciplinary Committee came to itself. In that connection, even if additional documentation were to be provided, as requested by the Applicant, it is unlikely that the Tribunal would know any more than it does now. Accordingly, the Tribunal must decide on the basis of the documentation - submitted to it by the Applicant and the Respondent - which, incidentally, is voluminous.

III. The ad hoc Joint Disciplinary Committee and the Secretary-General upheld three of the charges against the Applicant: (1) manifesting support for one party and participating actively in the civil strife in Rwanda in violation of the duty of United Nations staff members to be impartial; (2) denouncing a colleague, thereby endangering his safety and making it necessary for the Economic Commission for Africa to transfer him elsewhere; (3) deliberately lying by denying authorship of the "Note au Préfet", which contained the denunciation and

also information concerning other persons that was likely to put them in danger. The Tribunal finds the Applicant guilty of three of the charges against him (two other charges were dismissed), based on the quality of the investigation conducted by the Committee and on the Applicant's own admission regarding the principal evidence against him.

IV. The ad hoc Joint Disciplinary Committee itself noted that limited financial resources had made it difficult for it to conduct the investigation. It none the less expressed its conviction that, having followed the rules of due process as presented in the Staff Rules, a sufficient number of elements had become sufficiently clear to enable it to reach its conclusions in an equitable manner. The Tribunal did not only not question the Committee's impartiality, but, on the contrary, appreciated the quality of its work, which was conducted in Addis Ababa from 11 to 16 April 1994 as far as the consideration of documents was concerned and from 18 to 23 April in respect of the hearings. The Applicant was given ample opportunity to present his defence. Numerous witnesses were heard. The Committee conducted a thorough investigation into the facts and circumstances and also took into account the rivalries and tensions within the MULPOC which preceded them. It is a fact that the Applicant did not provide any evidence of bias against him or of the Committee's lack of impartiality. Furthermore, the Applicant did not challenge the authenticity of the principal evidence of his guilt.

V. The Applicant was found guilty based essentially on the "Note au Préfet". This is a document addressed to the prefect of Gisenyi, the official in charge of security in the region, whereby the Applicant draws the prefect's attention to the ties that several people, including one of his colleagues, have with the "Goma refugees", in other words with one of the factions involved in the civil war. Initially, the Applicant denied having written the note, when interrogated regarding a typewritten transcript which contained minor differences when compared with the handwritten note which he had sent to the prefect, a photocopy of which is

included in the file submitted to the Tribunal. The Tribunal considers that these differences do not alter the significance of the document. Subsequently, the Applicant admitted to being the author of the handwritten note. He did not go back on that admission in the documents submitted to the Tribunal and, in particular, in his written observations on the Respondent's answer. On the contrary, he maintained, first, that his "Note au Préfet" did not constitute a violation of his duty to remain impartial and, later, that the punishment meted out was excessive compared to the seriousness of the offence.

VI. In the light of these facts, and bearing in mind that the Secretary-General has discretionary powers on this subject, the Tribunal believes that the severe punishment which was meted out to the Applicant for violating the provisions of the Staff Regulations and of the Charter itself, was proportionate to the gravity of the consequences which could have ensued from the denunciations of which he was the author, given the circumstances in which they were made.

VII. The Tribunal rejects the application and all pleas submitted in connection with it.

(Signatures)

Samar SEN
Vice-President, presiding

Huber THIERRY
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary